IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No.

M. O. COWAN, D. C. WEBB AND VICTOR KLEIN, TRUSTEES UNDER THE PLAN AND AGREEMENT FOR REOPENING THE EAST TENNESSEE NATIONAL BANK,

Petitioners,

vs.

HAMILTON NATIONAL BANK OF KNOXVILLE, AS TRUSTEE OF THE ESTATE OF HAL S. HARRIS,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

I.

Opinions of the Court Below.

The opinions of the Supreme Court of Tennessee have not yet been officially reported but the opinion is found in the Record filed in this cause (R. 70-85) and on the petition to rehear (R. 103-105). Copies of these opinions are attached hereto (pp. 30-48).

II.

Jurisdiction.

1. The jurisdiction of the Court is based upon the Judicial Code, Section 237 (b), as amended by the Act of February 13, 1925. (Title 28, U. S. C. A. 344 b.)

2. The original date of the judgment or decree to be reversed is January 22, 1941 (R. 85). Petition for rehearing was filed February 4, 1941, within the time allowed therefor. (R. 85-86) and the petition for rehearing was denied March 8, 1941 (R. 103-105). The decree became final March 8, 1941.

3. Title 12 U. S. C., Sec. 207, and Title 12 U. S. C., Sec. 66 were drawn in question by petitioners, who specifically set up and claimed rights, privileges and titles thereunder which were denied by the Supreme Court of Tennessee in reversing the decision of the Chancellor.

III.

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for certiorari, which also contains a full statement of the questions presented, and in the interest of brevity are not repeated here. Any necessary elaborations will be made in the course of the argument which follows.

IV.

Specification of Errors.

The Supreme Court of Tennessee erred:

1. In reversing the decree of the Chancery Court of Knox County, Tennessee, which held that respondent was bound by its consent to the plan and agreement for the reorganiza-

tion of the East Tennessee National Bank, as declared effective by the Comptroller of the Currency, and liable on a note executed pursuant thereto.

2. In reversing the decree of the Chancery Court of Knox County, Tennessee, which held that a trust estate lawfully holding stock in a national bank and against which a valid assessment had been levied, had authority to consent, by its trustee, to a plan of reorganization of such a bank.

3. In reversing the decree of the Chancery Court of Knox County, Tennessee, and holding that a trust estate lawfully owning stock in a national bank and liable for an assessment of 100% thereon was not liable on its note executed pursuant to a plan of reorganization of such a bank under the Bank Conservation Act whereby the bank was restored to solvency and the assessment against the trust estate revoked and was not estopped to question the authority of the trustee to consent to the plan.

4. In reversing the decree of the Chancery Court of Knox County, Tennessee, and holding that because Carter, Trustee, as an individual, was a stockholder, director and officer of the closed bank, he was, as trustee, incapable of acting for the trust estate and thereby, in substance, denying the binding effect of the Bank Conservation Act and the determinations of the Comptroller thereunder.

V.

Summary of the Argument.

1. The National Banking laws constitute a complete code for the organization, operation, liquidation, consolidation and reorganization of a national bank. The rights, powers, liabilities and duties of stockholders consenting to the reorganization of a national bank are determined by applicable Federal statutes and decisions.

2. A trust estate lawfully owning stock in a national bank may consent to a plan of reorganization of such a bank and is bound by its consent under applicable Federal laws.

3. A note executed by a trust estate in an amount equal to a valid existing assessment against the trust estate, pursuant to a plan of reorganization of a national bank made effective under Title 12, U. S. C., Sec. 207, whereby the bank is restored to solvency and the assessment revoked, is a binding obligation of the trust estate.

4. States will not be permitted by statutes or decision to discriminate against national banks or, in a collateral proceeding, to set aside determinations of the Comptroller of the Currency lawfully made, in order to defeat the collection of such a note.

IV.

ARGUMENT.

I.

I. In the first place, it is respectfully insisted that the Supreme Court of Tennessee has decided Federal questions of substance under State laws contrary to the applicable Federal statutes and the decisions of this Court.

The questions for decision in this case flow from the reorganization of a national bank pursuant to Federal laws. These questions involve the rights of petitioners, as trustees under a plan of reorganization of a national bank, against a stockholder consenting to such a plan of reorganization and the binding effect of such a consent; the validity of a note executed by a consenting stockholder pursuant to the terms of the plan of reorganization where the note is required by the Comptroller of the Currency as a condition of his approval thereof; the power of the Comptroller of the Currency to require the execution of

notes by stockholders secured to his satisfaction representing more than two-thirds of the stock in such bank as a condition of his approval of such a plan; the right of a State court to set aside in a collateral proceeding the determinations of the Comptroller of the Currency and to substitute therefor its own conclusions. These are Federal questions.

National banks, as instrumentalities of the Federal Government, are under the paramount authority of the Federal Government.

In *Easton* v. *Iowa*, 188 U. S. 220, it is said:

> "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they are enacted. These principles are axiomatic, and are sustained by the repeated adjudications of this court."
>
> *Ibid*, page 238.

The Federal laws constitute a complete code for the government of national banks.

Cook County National Bank v. *U. S.*, 107 U. S. 445.

Provision is made by Federal law for their organization (Title 12, U. S. C. 21 *et seq.*), regulation (Title 12, U. S. C. 81 *et seq.*), visitation (Title 12, U. S. C. 161 *et seq.*), consolidation (Title 12, U. S. C. 33 *et seq.*), liquidation (Title 12, U. S. C. 181 *et seq.*) and reorganization (Title 12, U. S. C. 207).

The rights of petitioners are derived from the reorganization of a national bank under Federal statutes and their

validity and extent must be determined under Federal laws and in accordance with the Federal policy they implement.

Deitrick v. *Greaney*, 309 U. S. 190;
Yonkers v. *Downey*, 309 U. S. 590;
Ex Parte Worcester County Natl. Bank, 279 U. S. 347;
Jones National Bank v. *Yates*, 240 U. S. 541;
Dinan v. *1st Natl. Bank of Detroit*, 117 F. (2d) 459.

The consent of respondent to the plan of reorganization and the execution of its note pursuant thereto are consequences which flow from the reorganization as made effective under Federal statutes, and the binding effect of the consent and liability on the note must be determined under Federal laws and in accordance with Federal policy.

Deitrick v. *Greaney*, 309 U. S. 190;
Yonkers v. *Downey*, 309 U. S. 590;
Awotin v. *Atlas Exchange Natl. Bank*, 295 U. S. 209;
Forrest v. *Jack*, 294 U. S. 158.

No State can control, trammel or prevent the operation of these laws or the consequences which flow from them.

Seabury v. *Green*, 294 U. S. 165;
Davis v. *Elmira Savings Bank*, 161 U. S. 275.

It must follow, therefore, that the Supreme Court of Tennessee has decided Federal questions of substance and that, in denying under State laws: (a) the right of a trust estate lawfully owning stock in a national bank to consent to a plan of reorganization thereof; (b) the power of the trustee of such an estate to act for it in consenting to a plan of reorganization; (c) the validity of a note executed by a stockholder pursuant to such a plan of reorganization in response to the requirements of the Comptroller of the Currency; (d) the power of the Comptroller of the Currency in the exercise of the discretion vested in him by statute to approve a plan of reorganization subject to such restrictions, limitations and conditions as he may impose; and (e)

in the effect of the findings of fact made by the Comptroller of the Currency under statutory authority; the decision of the Supreme Court of Tennessee is contrary to the applicable Federal statutes and decisions.

II.

In the next place, it is respectfully insisted that under applicable Federal laws and decisions, a trust estate lawfully owning stock in a national bank may consent to a plan of reorganization of the bank and is bound by its consent.

Provision is made in the Bank Conservation Act for the consent of stockholders to a plan of reorganization (Title 12, U. S. C., 207).

Title 12, U. S. C., 66 specifically recognizes trust estates as stockholders in a national bank and charges trust estates with responsibility as stockholders "in like manner and to the same extent as the testator * * * would be if living and competent to act and hold the stock in his own name".

A stockholder in a national bank by accepting stock therein accepts the provisions of the Act, and his obligations, duties and rights are both statutory and contractual in nature.

Richmond v. *Irons,* 121 U. S. 27 (55).

> "All the terms of that Act are to be read into the ownership of said stock by the trust estate and must be included within the conditions of that ownership as originally imposed by the trust instrument from which the trust derives its powers."
>
> *Dixon* v. *Cannon,* 32 Fed. Sup. 627.

For the protection of creditors, stockholders and the public, the Comptroller of the Currency is charged with the duty of considering proposed reorganization plans and vested with discretion to determine whether or not the plan is fair and equitable and in the public interest (Title 12, U. S. C. 207).

Such a determination by the Comptroller of the Currency in discharge of his statutory duty is not subject to collateral attack.

Richmond v. *Irons, supra.*

It follows, therefore, that under the National Banking Act a trust estate may lawfully own stock in a national bank; that a trust estate, as a stockholder, is subject to the liabilities of a stockholder and has all other rights, duties and powers of a stockholder; that stockholders may consent to a plan of reorganization if it is declared fair and equitable and in the public interest by the Comptroller of the Currency; that such a consent by a trust estate binds the estate under the provisions of the Federal laws.

To hold otherwise is to subject the reorganization of a national bank and the rights and liabilities of depositors and stockholders arising therefrom to the hazards of varying interpretations and possible defeat by the courts and laws of the forty-eight States; to permit an important exception to the rule that the National Banking Acts constitute a complete code for the government of national banks; to make the task of the Comptroller of the Currency in declaring a plan effective almost impossible where banks have stockholders in various States subject to varying State statutes and decisions.

Petitioners' contention, that the power of a trust estate to consent to a plan of reorganization of a national bank is derived from the lawful ownership of stock of a national bank, achieves the uniformity of purpose of the National Banking laws without infringing on the right of the State to determine the lawful ownership of such stock or the liability of a trustee to a trust estate for any wrongful act; is consistent in that it gives the trust estate the power to discharge the duty and responsibility vested in it as a stockholder by the National Banking Acts, and establishes one

standard to guide the Comptroller of the Currency in determining the sufficiency of a consent instead of leaving him wandering in the quagmire of wills, trust instruments, statutes and decisions of forty-eight States.

III.

In the next place, it is respectfully insisted that this trust estate, having invoked a Federal law to secure the reorganization of a national bank by which the bank was restored to solvency and an assessment of 100% standing against the trust estate was revoked, is bound to pay the note which it executed under the Federal law so invoked.

The pertinent facts with reference to this are as follows:

The trust estate was the lawful owner and holder of stock in a national bank. This stock came into the hands of the executor and trustee as a part of the estate of Hal S. Harris (R. 29 V, 30). The bank failed and an assessment of $28,000.00 was levied against the trust estate for which the trust was liable (R. 30). Pursuant to the plan of reorganization, creditors and depositors of the bank waived claims against it so that it could be restored to solvency upon condition that stockholders to the extent required by the Comptroller of the Currency executed and secured notes equal to existing assessments and placed these notes with the trustees to be payable under conditions of the reorganization agreement (R. 30 VI, 31). In order to secure approval of the plan and this waiver of depositors, this trust consented to the plan and executed its secured note (R. 31 VIII). The plan was not declared effective by the Comptroller until after this note was executed (R. 31 VIII, R. 39 XXI). This estate waited until January 17, 1940 (almost seven years) to take any action seeking to be relieved of liability on its note so executed (R. 9).

The note was executed in order to comply with requirements made under a valid Federal law to accomplish the

reorganization of a Federal instrumentality, i. e., a national bank.

The Court, in the recent case of *Deitrick* v. *Greaney*, 309 U. S. 190, held that a note given to a national bank in lieu of an illegal investment was valid and binding on the maker; that the question of the validity of such a note was a Federal question to be decided under Federal law; that such a note was given to accomplish a Federal purpose and the Federal purpose having been accomplished by the delivery of the note, the maker could not be relieved of liability thereon by any private agreement between the maker and the bank to the effect that it was not to be collected.

The instant case comes clearly within this rule—Here the note was executed to accomplish a Federal purpose—and, the purpose having been accomplished by the delivery of this note, the maker will not be heard to assert lack of authority, if indeed such lack of authority could exist.

One who receives the fruits of a transaction will not be permitted to deny its validity while retaining its benefits.

Brandt v. *Virginia C. & I. Co.*, 93 U. S. 326.

Creditors in consenting to this plan of reorganization relied on this note to take the place of an existing assessment liability. This stockholder received the benefits of the plan—a revoked assessment—seven years without interest in which to pay and a possibility of complete avoidance of liability through payment of 70% of claims by liquidation of other assets. It cannot now restore the benefits obtained. It invoked the Federal law to obtain the benefit. Under a Federal law it will not be heard to deny the validity of the obligation it made in order to obtain the benefit.

Deitrick v. *Greaney*, 309 U. S. 190 (196-7).

IV.

Finally, it is respectfully insisted that under its own holdings, the Supreme Court of Tennessee has discriminated

against a national bank, its stockholders and creditors, and has, in a collateral proceeding, in effect, nullified the determination of the Comptroller of the Currency made by him pursuant to the Bank Conservation Act finding that the plan of reorganization is fair and equitable as to stockholders and in the public interest.

In the case of *Young* v. *Phillips*, 170 Tenn. 169, decided May 2, 1936, the Supreme Court of Tennessee held that an executor, a stockholder in a State bank, had authority under general principles of law to make a voluntary contribution to the capital of the State bank, whereby making the contribution the State bank could be restored to solvency and permitted to operate and the estate perhaps relieved from its liability as surety on a depository bond given by the bank.

It seems apparent, under the facts and this decision, that if Carter, Trustee, had been a stockholder in a State bank and acted as he did, his action would be valid. To hold his action as a stockholder in a national bank void unlawfully discriminates against a national bank.

In order to avoid this apparent discrimination, the Supreme Court of Tennessee sets aside the action of the Comptroller of the Currency.

(a) The opinion of the court in substance holds:

That the Bank Conservation Act requires the consent of only two-thirds of stockholders and provides leeway so that others do not need to consent (R. 71-78); that more than two-thirds consented to the plan of reorganization of the East Tennessee National Bank (R. 71-72) and pursuant to that consent, executed notes (R. 72-78); that this excess was not required by the Act and that, therefore, this trust estate did not have to execute its note to make the plan effective; that the Comptroller might have approved the plan without the note of this trust estate having been executed and

delivered; that, if the trust estate had not consented to the plan and had not executed its note, it would not be liable under the plan, and as the assessment was revoked it would not be liable for the assessment; that, therefore, the trustee should not have consented and the estate should not be liable on its note (R. 78).

This holding completely nullifies the authority vested in the Comptroller of the Currency by the Bank Conservation Act to approve "the plan subject to such conditions, restrictions and limitations as he may prescribe" (Title 12, U. S. C. 207), because, in approving this plan, the comptroller approved it subject to a condition which required more than two-thirds of the shares of stock to be represented by notes *secured to the satisfaction of the Comptroller of the Currency* (R. 36 (5)).

In order to make the plan effective under the Act this condition had to be met. The holding of the Supreme Court of Tennessee, in effect, denies the power of the Comptroller to impose a condition in his approval of a plan of reorganization and leaves him with authority limited to accepting or rejecting a plan tendered to him in the form tendered. This is contrary to the express provisions of the Act. The holding of the Court that the Comptroller might have approved the plan without the execution of this note is based on pure speculation (without a word of proof) as to what the Comptroller might have done under other conditions. The facts are this note was required (R. 36 (5)). It was given (R. 31 VIII). The plan was approved with this note as an asset delivered to the Trustees. The Supreme Court of Tennessee disregards these facts, speculates on others, and in a collateral proceeding, nullifies the action of the Comptroller requiring this note and approving the plan with its present.

(b) The opinion of the court in substance holds:

That the plan of reorganization was "charged with peril" (R. 80), was "dangerous" and "delicate" (R. 105) and unlikely to be beneficial (R. 78-79); that Carter, Trustee, was individually a stockholder in the bank and had for years been an officer thereof; that Carter acted in good faith but subconsciously feared disaster and litigation for himself if the reorganization failed; that, therefore, his own interest was antagonistic to that of his trust, and under these conditions, the trust estate was not bound by its consent or note.

Of necessity this holding in a collateral proceeding sets aside the determination of the Comptroller made by him in discharge of his statutory duty and substitutes therefor a determination of the same question by a State court.

The Comptroller found that the plan was "fair and equitable * * * as to stockholders and in the public interest".

The Supreme Court of Tennessee finds that the plan was "charged with peril" and "dangerous and delicate".

The Comptroller determines that the plan—is fair and equitable—*and in the public interest.*

The Supreme Court of Tennessee, in effect, finds that the plan is in the private interest of a stockholder and former officer—to relieve him of subconscious apprehension as to disaster and litigation and unlikely to be beneficial.

Again it is called to the attention of this Court that the only antagonistic interest of Carter found by the Supreme Court of Tennessee was a subconscious one—drawn by inference only from the stipulated facts that Carter was a stockholder in the bank and had long been an employee and officer of the bank (R. 81-82). No case has been found which holds that these *facts* would create any antagonistic relationship. Rather they would seem to be an additional qualification for the exercise of good judgment. No benefit was obtained by Carter individually that was not parallel to that obtained by the trust and no liability was incurred

by the trust that was not parallel to that incurred by Carter individually. So there could be no antagonistic special benefit obtained by Carter individually.

Respondent admits that Carter acted in good faith, pursuant to advice of counsel and at the written request and direction of the life beneficiary of the trust estate who also had a general power of appointment by will over the entire *corpus* of the trust.

The theory, in the opinion of the Supreme Court of Tennessee, of the conflict of interest between Carter, Trustee, and Carter, individually, is based on speculation by the Court as to the reaction of Carter's subconscious mind to the fact that he was a stockholder and had been an officer and employee of the closed bank. The opinion in response to the petition to rehear states:

> "On the contrary the opinion disclaims any intention to impute to Mr. Carter 'a wrongful purpose or conscious bias'. Throughout the opinion a distinction is recognized and applied between bad faith and subconscious influence resulting from the circumstances and situation" (R. 104).

This speculation by the Court concludes that Carter, Trustee, while consciously acting in good faith, subconsciously knew that this plan was dangerous and delicate and was for his special benefit, and that, therefore, the interest of the trust and of Carter individually were antagonistic.

The facts that Carter consciously acted in good faith and the plan was fair and equitable and in the public interest are disregarded by the Court and "subconscious influences" substituted therefor.

The result of this speculation directly conflicts with the determination of the Comptroller of the Currency that this plan was fair and equitable and in the public interest.

It must follow, therefore, that the Supreme Court of Tennessee has unlawfully discriminated against a national bank and has, in a collateral proceeding, set aside the determinations of the Comptroller of the Currency.

It is earnestly insisted, for reasons herein and in the petition set forth, that the writ of certiorari be granted and the decision of the Supreme Court of Tennessee be reversed.

Respectfully submitted,

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